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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MICHAEL BARNES, Prosecuting Attorney of St. Joseph County, Indiana, *et al.*,
Petitioners,

v.

GLEN THEATRE, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, UNITED STATES CONFERENCE OF MAYORS, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether nude dancing in a bar or adult theatre constitutes "speech" within the meaning of the First Amendment.

2. Whether, assuming such dancing is a form of "speech," the State may apply to such conduct a content-neutral public indecency statute, which prohibits public nudity and does not seek to regulate the expression of ideas.

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INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect the powers and responsibilities of state and local governments. This case, yet another example of the ingenuity of counsel in fashioning constitutional challenges to a State's ordinary exercise of its police power, raises issues whose resolution will have a direct and substantial impact on *amici* and their members.

Respondents challenged the Indiana public indecency statute, claiming that the statute is unconstitutional because it interferes with an alleged First Amendment right of persons to appear naked in public as part of a dance in a bar or adult theatre. In a serious departure from this Court's decisions, the court of appeals declared that the Indiana statute unconstitutionally interferes with symbolic speech protected under the First Amendment.

The decision below rests on a sweeping characterization of dance as "expression," without regard to whether the dancer intends to communicate a particularized message and without regard to whether any such message is likely to be understood by the viewer. Having declared the dance in question to be "expression," the court eschewed any further inquiry into the question whether a content-neutral statute like Indiana's public indecency law can constitutionally be applied to certain well-defined conduct, where an incidental result may be some minimal restriction on a person's right to engage in allegedly communicative acts. Instead, the court jumped directly from the premise that nude dancing is expression to the conclusion that Indiana's law is unconstitutional as applied to such dancing.

If allowed to stand, the court of appeals' reasoning would invalidate, or at least encourage attempts to invalidate, many other state and local public indecency statutes or regulations. Such a result would substantially impair the ability of *amici*'s members to enforce long-standing public indecency laws. The threatened laws were enacted pursuant to the traditional police power of state and local governments to maintain a decent society, preserve society's moral structure, and prevent the detrimental consequences that flow from the crass commercial exploitation of sex. For these reasons, *amici* submit this brief to assist the Court in its resolution of this case.[1]

[1] The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.3 of the Rules of the Court.

STATEMENT

A. Indiana's Public Indecency Statute

The statute at issue in this case is Indiana's public indecency statute, Ind. Code § 35-45-4-1. In relevant part, the statute provides that "[a] person who knowingly or intentionally, in a public place * * * appears in a state of nudity * * * commits public indecency, a class A misdemeanor." The law defines "nudity" as:

> the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state.

In 1979, several years before respondents filed their complaints, the Supreme Court of Indiana reviewed a challenge to the constitutionality of Indiana's public indecency law brought by dancers who wished to appear nude in bars and by bar owners who wished to offer such dancing. In response to a claim that the statute was unconstitutionally overbroad because it applied to speech protected under the First Amendment, the state Supreme Court acknowledged that "it may be constitutionally required to tolerate or to allow some nudity as a part of some larger form of expression meriting protection, when the communication of ideas is involved." *State v. Baysinger*, 272 Ind. 236, 397 N.E.2d 580, 587 (1979). The court emphasized, however, that "[t]here is no right to appear nude in public" and that "public nudity itself * * * is conduct which traditionally has been held to be public indecency, which is within the power of the legislature to prohibit." *Ibid.* The court therefore rejected the overbreadth challenge to the Indiana law. The court also rejected a claim that the statute's use of the phrase "public place" was unconstitutionally vague. *Id.* at 582-583.

Turning to the question whether the nude barroom dancing at issue was simply conduct or was expression

entitled to First Amendment protection, the *Baysinger* court observed that even the dancers themselves did not contend that the Indiana statute inhibited any "pure speech" or "the expression of any ideas." 397 N.E.2d at 587. The court concluded, therefore, that dancing nude rather than scantily clad "is conduct, not speech," and that "[t]he governmental interest in prohibiting conduct that has long been recognized as public indecency is unrelated to the suppression of free speech." *Ibid.*

In two separate appeals, the dancers and bar owners appealed the *Baysinger* decision to this Court, renewing their arguments that the Indiana public indecency statute is unconstitutionally vague and overbroad. This Court dismissed the appeals for want of a substantial federal question. *Clark v. Indiana*, 446 U.S. 931 (1980), and *Dove v. Indiana*, 449 U.S. 806 (1980). These dismissals, of course, constituted rulings on the merits rejecting the vagueness and overbreadth challenges to the Indiana law. See *Hicks v. Miranda*, 422 U.S. 332, 343-44 (1975).

B. Respondents' Challenge To The Indiana Statute

In 1985, respondents in the present case filed two separate actions in the federal district court, challenging the constitutionality of the Indiana public indecency statute. Respondents sought injunctive relief barring enforcement of the statute as applied to nude dancing in an adult bookstore, theatre, or bar.

The first action involved respondent Glen Theatre, Inc., the owner of an adult bookstore ("Chippewa Bookstore") and drive-in theatre ("Chippewa Drive-In") that wished to offer nude dancing, and two dancers, respondents Gayle Sutro and Carla Johnson, who wished to dance nude at the drive-in or the bookstore. J.A. 3-4. The *Glen Theatre* plaintiffs submitted two affidavits in support of their motion for injunctive relief. Roger Judd, the manager of the Chippewa Bookstore, explained that the adult bookstore offered "nude and semi-nude" dancing and the

"showing of the female body through glass panels." J.A. 16. He also stated that the bookstore had been required to stop offering live nude dancing because of police enforcement of the Indiana public indecency statute. J.A. 17. In her affidavit, Sutro stated that she was scheduled to perform nude dances at the Chippewa Drive-In, dances that she claimed "are an attempt to communicate as well as to entertain." J.A. 14.

The second action was brought by respondent JR's Kitty Kat Lounge, Inc., a bar that wanted to offer live nude dancing, and respondent Darlene Miller, a dancer at the bar who wanted to dance nude rather than with the minimal amount of clothing required by Indiana law. J.A. 23. Plaintiffs in both cases claimed that the Indiana public indecency statute was unconstitutional as applied to nude barroom dancing. J.A. 2, 7, 21.

C. The Initial Proceedings In Federal Court

Glen Theatre and *Miller* initially were assigned to different district court judges. The court in *Glen Theatre* ruled that the Indiana public indecency statute was facially unconstitutional for overbreadth and enjoined enforcement of the statute. Pet. App. 149-158. The court in *Miller*, following a hearing at which both Miller and the owner of the Kitty Kat Lounge testified, denied plaintiffs' request for a preliminary injunction.

On the State's appeal from the district court's ruling in *Glen Theatre*, the court of appeals held that the Indiana public indecency statute was not unconstitutionally overbroad. *Glen Theatre, Inc. v. Pearson*, 802 F.2d 287 (7th Cir. 1986) (Pet. App. 140-147). Relying on this Court's dismissal of the appeals in *Baysinger*, the court of appeals reversed the district court's injunction because the overbreadth argument had already been definitively rejected by this Court. Pet. App. 144. The court of appeals remanded for the district court to address plaintiffs' "as applied" challenge to the Indiana law. *Id.* at 146.

The court of appeals instructed the district court to "examine the plaintiffs' proffered evidence of the dancing they wish to perform and decide, whether if considered as a whole, the activity should be afforded First Amendment protection." *Id.* at 147.

D. The Proceedings After Remand

On remand, the district court consolidated *Glen Theatre* with *Miller*. The evidence before the court consisted of the affidavits submitted by respondents in support of their injunction motions, the testimony at the preliminary injunction hearing in *Miller*, a further affidavit from the owner of the Kitty Kat Lounge, and a videotape of dances that were representative of those that the Kitty Kat Lounge wanted to offer to the public.

Based on its review of this evidence, the district court concluded that the conduct at issue is "not expressive activity protected by the Constitution of the United States." *Glen Theatre, Inc. v. Civil City of South Bend*, 695 F. Supp. 414, 419 (N.D. Ind. 1988) (Pet. App. 130). The district court based its decision on factual findings made in the prior injunction proceedings and on its own review of the affidavits and videotape. The district court found that the dances are "not a part of any type of play or dramatic performance" but that they merely involve "a female, fully clothed initially, who dances to one or more songs as she proceeds to remove her clothing." Pet. App. 124. The court also found that, of all the dancers involved through affidavits or videotapes, only Sutro even asserted that she was making any "attempt to communicate" through her dance (*id.* at 132), while Miller admitted that she was "just entertaining, just dancing" so that customers would like her and buy more drinks. *Id.* at 133. Because it could not find any constitutionally protected expression in the performances, the district court held that the dances were "mere conduct." *Id.* at 130. The court therefore upheld the State's application of its public indecency law to prohibit nudity in respondents' dancing.[2]

The court of appeals reversed, holding that "non-obscene nude dancing as entertainment is a form of expression entitled to limited first amendment protection." *Miller v. Civil City of South Bend*, 887 F.2d 826, 829 (7th Cir. 1989) (Pet. App. 117). Although the panel recognized that this Court "has not explicitly held that nude dancing is expressive activity protected by the first amendment" (Pet. App. 114), it concluded that "[i]n substance, nude dancing is still expression." *Id.* at 118. The court said that the State "has not presented any legitimate grounds for defending the statute," and it therefore declined to consider the State's power to "impose reasonable time, place, and manner restrictions on protected expression" or its power to "regulate the non-expressive conduct for reasons unrelated to the suppression of speech." *Id.* at 119. The court held that application of Indiana's public indecency law to nude dancing in bars or adult theatres violates the First Amendment.

E. The *En Banc* Decision Of The Court Of Appeals

On rehearing *en banc*, the court of appeals sustained the panel decision, by a vote of 7-4. *Miller v. Civil City of South Bend*, 904 F.2d 1081 (7th Cir. 1990) (Pet App. 1-109). The court declared that it was "constrained to hold * * * as a matter of law, [that] non-obscene nude dancing performed as entertainment is expression and as such is entitled to limited protection under the first amendment." Pet. App. 8.

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[2] Presumably because the Indiana public indecency statute applies to all public places, not just those serving liquor, the State did not attempt to rely on the Twenty-first Amendment to justify application of the law to the Kitty Kat Lounge. This Court has made clear, however, that a State is empowered under the Twenty-first Amendment to prohibit nude barroom dancing. See, *e.g.*, *California v. LaRue*, 409 U.S. 109 (1972); *City of Newport v. Iacobucci*, 479 U.S. 92 (1986) (per curiam).

Although acknowledging "the distinction between conduct and expression" that exists in this Court's symbolic speech cases (Pet. App. 8), the majority nonetheless rejected as "misconceived" any attempt "to distinguish between expressive and nonexpressive dance." *Id.* at 10. Instead, the court concluded that "dance as entertainment is a form of conduct that is *inherently expressive*" (*id.* at 8) (emphasis added) and that such dance "inherently embodies the expression and communication of ideas and emotions." *Id.* at 12. In the court's view, "[t]he dominant theme communicated here by the dancers is an emotional one * * * of eroticism and sensuality." *Id.* at 11. Moreover, the court said, "those who view the respective dances readily comprehend the intended message, for they advance currency to view them." *Id.* at 12.

The court of appeals was unconcerned that most of the dancers did not claim any intent to communicate, and that the only dancer who did make such a claim failed to identify any particularized message that she allegedly sought to convey. The court simply announced that it was not bound by respondents' "characterizations" of their conduct, and it rejected the district court's findings as "clearly erroneous." Pet. App. 11 n.5. Although acknowledging "the State's laudable concerns which apparently are the bases of the Indiana statute," the majority summarily concluded that "the total ban at issue here" cannot be justified either as a reasonable time, place, and manner restriction or as a regulation of expressive conduct for reasons unrelated to the suppression of speech. *Id.* at 16.

Judges Coffey, Easterbrook, Manion, and Kanne dissented. Their three opinions shared two fundamental disagreements with the majority decision.

First, the dissenting judges found no basis for concluding that the nude dancing involved in this case was "speech" or "expression" protected by the First Amend-

ment. They observed that respondents did not even claim to be conveying any idea or message, and they stressed that such a conscious intent to communicate is essential if mere purposive conduct is to be treated as expression, and thus entitled to some measure of the constitutional protection afforded to real speech. Pet. App. 71-72 (Coffey, J., dissenting); *id.* at 84-86 (Easterbrook, J., dissenting); *id.* at 101 (Manion, J., dissenting). In the dissenters' view, the district court's specific finding that "the dancers' conduct was 'not expressive activity'" was not clearly erroneous, and it required that the Indiana statute be sustained as applied to respondents. *Id.* at 72 (Coffey, J., dissenting); *id.* at 85 (Easterbrook, J., dissenting); *id.* at 101 (Manion, J., dissenting).

Second, even assuming that some protected expression was involved in respondents' nude dancing, the dissenting judges found the Indiana statute a permissible content-neutral regulation of conduct. They emphasized that the statute concerns only public nudity and does not seek to suppress free expression. "The law has nothing to do with the expression or viewpoint of the undressed person. * * * It is indifferent to whether there is a message, or to the viewpoint expressed by any message." Pet. App. 80, 83-84 (Easterbrook, J., dissenting). The dissenters also observed that the statute targeted only that conduct that the State intended to eliminate and left open "myriad ways in which [respondents] could communicate their erotic and sensual theme." *Id.* at 76 (Coffey, J., dissenting). See also *id.* at 79, 83-84 (Easterbrook, J., dissenting).

Finally, all four dissenting judges found the State's interest sufficient to justify any restriction imposed on expression by Indiana's public indecency law. All of the dissenting judges agreed that Indiana's public indecency statute properly "may express moral views about how the community should live." Pet. App. 99 (Easterbrook, J., dissenting). Judge Coffey noted that the justification for

the statute was "self-evident." *Id.* at 53. He stated that the law "implements the state's interest in public morality, a legitimate and praiseworthy goal unrelated to speech" (*id.* at 48) and that it fosters the "moral climate in which [Indiana's citizens] choose to live and raise their children." *Id.* at 51. In Judge Coffey's view, the statute also protects against various harmful effects that may be associated with public displays of nudity (such as nude dancing in bars or adult bookstores). Among these social ills, Judge Coffey listed, *inter alia*, prostitution and other crimes (*id.* at 60), degradation of women (*id.* at 57), neighborhood blight (*id.* at 65), and the spread of sexually transmitted diseases (*id.* at 65-66).

SUMMARY OF ARGUMENT

I.

This case does not involve the spoken or written word. A dancer's act of removing her last items of clothing does not constitute "speech" in any common sense of the word. Moreover, this Court has long recognized that not all conduct rises to the level of symbolic expression entitled to some limited First Amendment protection. In fact, conduct receives such protection *only* if two conditions are met. There must be a conscious intent to convey a particularized message, and there must be a great likelihood that that message will be understood by the persons viewing the conduct. See *Texas v. Johnson*, 109 S. Ct. 2533, 2539 (1989); *Spence v. Washington*, 418 U.S. 405, 410-411 (1974) (per curiam). The burden of showing that conduct is expressive falls on the party claiming First Amendment protection. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984).

Although the court of appeals paid lip service to these principles, it based its decision almost entirely on the assertion that "dance as entertainment" is "inherently expressive." The court of appeals first went astray by focusing on respondents' dances rather than only on the nudity

that the Indiana statute prohibits. The court then compounded the problem by disregarding respondents' own disclaimers of any "particularized message" and by failing to provide any justification for its conclusion that the district court's factual findings were clearly erroneous. With no support other than its own say-so, the court of appeals ruled that the dances qualified as symbolic expression because they communicated an emotional "theme" of "eroticism and sensuality." The court further erred by declaring that, because customers pay to see the dances, the dancers' alleged "message" must be one that is readily understood.

As the dissenting judges correctly explained, the district court found that the nude dancing at issue involved no expressive activity, and there was no reason to disturb that finding. Respondents did not identify any particularized message they sought to convey, and, in fact, one of respondents' counsel conceded at oral argument in the court of appeals that no "political or ideological statement" was being made and no idea was being expressed. The court of appeals failed even to cite this Court's decision in *City of Dallas v. Stanglin*, 109 S. Ct. 1591 (1989), and it offered no reason why nude barroom dancing should be considered more expressive than the recreational dancing that the Court there held not entitled to any First Amendment protection.

II.

Even if the dancing involved in this case did qualify as symbolic expression entitled to some limited First Amendment protection, the court of appeals erred in concluding that the Indiana public indecency statute is an unconstitutional restriction on that expression. This Court has often held that the First Amendment is not absolute and that a State may regulate or prohibit conduct—even conduct containing an expressive component—so long as it does so by content-neutral statutes unrelated to the purposeful re-

straint of expression, or through reasonable time, place, or manner restrictions.

The Indiana public indecency statute meets this description. It satisfies all of the criteria that the Court has established for such laws. See, *e.g.*, *United States v. O'Brien*, 391 U.S. 367, 376-377 (1968); *Clark*, 468 U.S. at 293. First, the statute is content-neutral; it is concerned solely with public nudity, which it prohibits regardless of whether any message is intended and regardless of what the message is. The statute is not limited to sexually oriented businesses or to dancing, and there is no claim in the case that the statute is enforced discriminatorily against expressive activity. Second, the statute serves important state interests that this Court has recognized as legitimate, including adherence to community moral standards, and promotion of the kind of social, ethical, and cultural environment desired by Indiana residents acting through their elected representatives. See, *e.g.*, *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 59-60 (1973). Third, the statute is narrowly tailored to prohibit only the conduct identified by the State as undesirable, and it leaves open ample alternative channels for the communication of any message respondents may wish to convey. As Judge Coffey correctly observed in his dissent, respondents "must only remain attired in the barest minimum of clothing during their dances, a requirement that hardly impedes the communication of the themes 'of eroticism and sensuality.'" Pet. App. 75.

ARGUMENT

I. RESPONDENTS' NUDE DANCING IS NOT SYMBOLIC "SPEECH" WITHIN THE MEANING OF THE FIRST AMENDMENT.

A. This Court Has Established A Fact-Specific Two-Part Test For Determining Whether Conduct Qualifies As Symbolic Speech.

The Court has long recognized that conduct can in some circumstances rise to the level of protected First Amendment "speech." See *Stromberg v. California*, 283 U.S. 359, 369 (1931). The Court has also recognized, however, that not all conduct qualifies as "speech" for First Amendment purposes. For example, the Court observed as recently as last year that it is possible to act with "no thought of expressing any idea" or of communicating any message, and that such nonexpressive conduct is not protected by the First Amendment. *Texas v. Johnson*, 109 S. Ct. 2533, 2538-2539 n.3 (1989).

This point is critical; otherwise, virtually every law regulating conduct would present a First Amendment issue. As Judge Posner remarked in his concurring opinion below, "[t]here is a sense in which everything we do consciously and much of what we do unconsciously is expressive * * *." Pet. App. 22. But that cannot be enough to implicate the First Amendment. In the Court's words, although "[i]t is possible to find some kernel of expression in almost every activity a person takes[,] * * * such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *City of Dallas v. Stanglin*, 109 S. Ct. 1591, 1595 (1989).

Because some conduct is protected by the First Amendment and some conduct is not, the Court years ago developed a two-part test for distinguishing between symbolic "speech" and nonexpressive conduct that triggers no constitutional protection. The test was set forth in *United States v. O'Brien*, 391 U.S. 367, 376 (1968), and *Spence v.*

Washington, 418 U.S. 405, 409 (1974) (per curiam), and recently reaffirmed in *Johnson*, 109 S. Ct. at 2539 (citations omitted):

> While we have rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea," we have acknowledged that conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments."
>
> In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it."

Thus, two conditions must be satisfied before conduct containing "some kernel of expression" can rise to the level of protected speech: 1) the person engaging in the conduct must consciously intend to convey a particularized message; and 2) there must be a great likelihood that the particularized message will be understood by persons who observe the conduct.

The burden is on "the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984). Any other rule would create an unwarranted presumption that all conduct is expressive. *Ibid.* Even in cases involving obvious communicative symbols, such as flags that are "[p]regnant with expressive content," the Court has not abandoned the two-part symbolic speech test and has "not automatically concluded * * * that any action taken with respect to [the symbol] is expressive." *Johnson*, 109 S. Ct. at 2540. Rather, the Court has focused on the facts of the particular case and on the specific inquiries derived from *O'Brien* and *Spence*. See, *e.g.*, *Johnson*, 109 S. Ct. at 2544 n.8. This course is particularly appropriate where, as here, the conduct at issue does not involve any obviously communicative symbols. See *Stanglin*, 109 S. Ct. at 1595 (recreational or social dancing not protected by the First Amendment).

B. The Nude Dancing At Issue Here Does Not Qualify As Symbolic Speech Under This Court's Test.

The court of appeals' first error was in proceeding as if the Indiana public indecency statute regulated dancing rather than nudity. The statute does not even mention dancing, and it applies to all persons in Indiana, not just dancers. The law leaves respondents free to present whatever dances they wish, as long as the dancers are not naked. As both Judge Posner (Pet. App. 41) and Judge Coffey (*id.* at 70) noted in their separate opinions below, the amount of clothing required to comply with the Indiana statute is minimal. Accordingly, the appropriate question for the court to have asked was not whether respondents' dances are "expressive," but whether respondents' nudity—in particular, the removal of the last scanty items of clothing required by the State—constitutes expression.

It is difficult to imagine what separate message might have been conveyed by the dancers' nudity that was not already conveyed when respondents performed "wearing only tiny 'pasties' and a G-string" (see Pet. App. 41 (Posner, J., concurring); *id.* at 133). Neither respondents nor the court of appeals has even suggested what separate communication might have been effected by respondents' nudity, and nudity is the only relevant conduct that the Indiana statute prohibits. That should have been the end of the matter, but the court of appeals chose to focus instead on respondents' dances in their entirety. The court then erred a second time by ignoring this Court's test for symbolic speech and concluding that all "dance as entertainment" is "inherently expressive." In fact, however, neither part of this Court's test is satisfied by respondents' dancing.

1. *Respondents' nude dancing was not intended to, and does not, convey a particularized message.*

In this case, four of the five plaintiffs did not even claim that they intended to communicate anything by their conduct. Counsel for respondents in *Miller* made the point explicit at oral argument in the court of appeals: "I do not contend that there is some idea being expressed" (quoted at Pet. App. 85 (Easterbrook, J., dissenting)). Respondent Miller likewise admitted that she did not intend to convey any message by her dancing. Her purpose, she said, is merely to "try to get customers to like her so that they will buy more drinks later." Pet. App. 133. This Court has never afforded any First Amendment protection to unintended or unconscious communication, and it should not start now.

The fifth plaintiff, Gayle Sutro, is a dancer who was scheduled to perform at the Chippewa Drive-In, one of the facilities owned by respondent Glen Theatre. The record does not include any details regarding her intended performance. Sutro stated in her affidavit that her dances "are an attempt to communicate as well as to entertain." J.A. 14. She failed, however, to identify any particular message that she allegedly seeks to convey, and respondents have suggested none.

Although the Court has recognized that the message intended by particular conduct sometimes can be ascertained from the circumstances or context in which the conduct occurs, the context of respondents' dances does not disclose any particularized message that may have been intended. Unlike the situations before the Court in *Johnson* (burning of flag at anti-war, anti-Reagan demonstration during the Republican National Convention), *Clark* (sleeping in tent city on the first day of winter as part of a demonstration about inadequate care for the homeless), *Spence* (affixing peace sign to upside-down flag following the invasion of Cambodia), or *O'Brien* (burning of draft card

as part of Vietnam war protest), the nude dancing at issue here was not part of a larger political or social demonstration and did not involve any issue of public concern. The context of the dancing does not imply any particularized message that the dancers may have intended by their nudity.

Because respondents bear the burden of establishing that their conduct is symbolic speech, their failure to identify any specific message that they intended to convey dooms their claim. The district court correctly found, based on the record before it, that respondents' dances did not involve expressive activity. That finding should have been respected, particularly since respondents did not challenge it. See Pet. App. 85 (Easterbrook, J., dissenting).

The court of appeals, however, without relying on any particular facts in the record, concluded that all "dance as entertainment" is "inherently expressive" (Pet. App. 8) and that the nude dancing in this case communicated a "dominant theme" of "eroticism and sensuality." *Id.* at 11. Even if one were to accept the court of appeals' declarations at face value, they still would not satisfy the first part of this Court's test for symbolic speech. The Court has consistently required an "intent to convey a *particularized* message." *Johnson*, 109 S.Ct. at 2539 (emphasis added; citation omitted). The court of appeals has not only ignored the intent requirement but it has sought to excuse the absence of any particularized message by relying instead on a general emotional theme. That approach is not supported by this Court's decisions, and it would have the effect of converting virtually any deliberate conduct into some form of symbolic speech.

The court of appeals erroneously accuses the State of arguing that "the dance involved loses its expressive qualities as the dancers lose their clothing." Pet. App. 10. In reality, the point runs in just the opposite direction. The mere fact that nudity or sex is involved does not

transform otherwise unprotected activity into symbolic speech. Contrary to the apparent assumption of the court below, dancing does not automatically become more expressive when performed nude. If the dancing would not be protected from state regulation if the dancers were fully clothed or attired in "only tiny 'pasties' and a G-string," it does not miraculously acquire First Amendment protection when the dancer removes her last piece of clothing. Just as linking the words "sex" and "books" neither creates nor destroys First Amendment protections, so linking the words "nude" and "dancing" does not limit the State's capacity to regulate or prohibit. See *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705 (1986); *id.* at 711 (Blackmun, J., dissenting).

This Court's recent decision in *Stanglin*, 109 S. Ct. at 1595, strongly suggests, if it does not formally hold, that there is no First Amendment impediment to state or local regulation of recreational dancing. As Judge Easterbrook recognized in dissent (Pet. App. 95), dancing in bars is not different in any constitutionally significant way from dancing in a combined dance hall and roller skating rink. If the State may regulate the latter without jeopardizing any expression protected by the First Amendment, it may regulate the former as well. The result does not change when the dancer sheds her last item of clothing.

2. There is no great likelihood that respondents' dancing would be understood by a viewer to convey a particularized message.

The court of appeals' conclusion that there is a great likelihood that the nude dancing at issue here would be understood by a viewer to communicate a specific message is even more tenuous than its finding of a message in the first place. Even assuming that some particularized message was intended by the dancers, the record provides no evidence concerning the probability that reasonable viewers would understand that message.

In lieu of record evidence, the court of appeals relies entirely upon the following assertion:

> And it is apparent that those who view the respective dances readily comprehend the intended messages, *for they advance currency to view them.*

Pet. App. 12 (emphasis added). Under the court of appeals' analysis, any time people pay to see an event, whether it be a baseball game, a boxing match, or a bullfight, a court should conclude that the viewers "readily comprehend" the particularized message intended by the performers. This does not follow. The fact that viewers pay proves only that they desire to witness the event, not that they are receiving and understanding messages from the performers.

Although viewer surveys may not be necessary to show that a particularized message was understood, something other than mere paid admissions is needed. Because the record in this case offers nothing more, respondents have failed to satisfy their burden of establishing that their conduct rises to the level of symbolic speech entitled to First Amendment protection.

II. ASSUMING RESPONDENTS' NUDE DANCING IS PROTECTED SPEECH, INDIANA'S PUBLIC INDECENCY STATUTE IS CONSTITUTIONAL BECAUSE IT IS CONTENT-NEUTRAL, SERVES A SUBSTANTIAL GOVERNMENTAL INTEREST, AND IS NARROWLY TAILORED.

Even assuming that respondents' nude dancing is constitutionally protected speech, "this assumption only begins the inquiry." *Clark*, 468 U.S. at 293. First Amendment protection is not absolute. Rather, it "permit[s] reasonable regulation of speech-connected activities." *Tinker v. Des Moines School District*, 393 U.S. 503, 513 (1969). See also, *e.g.*, *Roth v. United States*, 354 U.S. 476, 482-483 (1957) (the First Amendment "gave no absolute protection to every utterance" and "was not

intended to protect every utterance"); *Miller v. California*, 413 U.S. 15, 23 (1973) (the First Amendment has "'never been treated as [an] absolute[]'") (quoting *Breard v. Alexandria*, 341 U.S. 622, 642 (1951)). Thus, even if Indiana's public indecency statute restricts expression, that does not mean that the statute is unconstitutional; it means only that the statute's constitutionality depends on whether its restrictions are permissible under the First Amendment.

A. A Single Test Applies, Whether Indiana's Public Indecency Statute Is Deemed To Be A Regulation Of Conduct Or A Time, Place, Or Manner Restriction On Expression.

In *O'Brien*, the Court articulated a test for determining whether restrictions on conduct that also have an effect on symbolic speech are constitutional. The Court held that, "when 'speech' and 'nonspeech' elements are combined in the same course of conduct," a regulation of "the [illegible]peech element can justify incidental limitations o[illegible]t Amendment freedoms" if four conditions are met: 1) the regulation "is within the constitutional power of the Government"; 2) the regulation "furthers an i[illegible]t or substantial governmental interest"; 3) "th[illegible]mental interest is unrelated to the suppression [illegible] expression"; and 4) "the incidental restriction on [illegible]eged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S. at 376-377.

The Court has also developed a comparable four-part test to determine the constitutionality of time, place, or manner restrictions on various forms of speech. *Clark* held that "reasonable time, place, or manner restrictions * * * are valid" if: 1) "they are justified without reference to the content of the regulated speech"; 2) "they are narrowly tailored"; 3) they "serve a significant governmental interest"; and 4) "they leave open ample alternative channels for communication of the information." 468 U.S. at 293.

The Court has recognized the substantial overlap between the two tests. For example, the Court said in *Clark* that all forms of "[e]xpression, whether oral or written or symbolized by conduct, [are] subject to reasonable time, place, or manner restrictions." 468 U.S. at 293. The Court acknowledged that the four-factor *O'Brien* test "for validating a regulation of expressive conduct * * * in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions." *Clark*, 468 U.S. at 298. A single test therefore can be applied to Indiana's public indecency statute, whether it is viewed as a regulation of conduct or as a time, place, or manner restriction on speech.

B. Indiana's Public Indecency Statute Is Content-Neutral.

Neither the court of appeals nor respondents have asserted that the regulation of public indecency falls outside the traditional police powers of state and local governments. The Court can turn immediately, therefore, to the question whether Indiana's statute is content-neutral or, to put the issue in *O'Brien*'s terms, whether the rationale for the statute is "unrelated to the suppression of free expression." 391 U.S. at 377. Content-neutral regulations are those that "are justified without reference to the content of the regulated speech." *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976), quoted in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986). See also *Clark*, 468 U.S. at 295 (a regulation is content-neutral if it "is not being applied because of disagreement with the message presented"); *Johnson*, 109 S. Ct. at 2540 (a content-neutral statute is one that does not "proscribe particular conduct *because* it has expressive elements" and does not make "'the communicative nature of the conduct * * * [the] *basis* for singling

out that conduct for proscription' ") (emphasis in original) (quoting *Community for Creative Non-Violence v. Watt*, 703 F.2d 586, 622-623 (D.C. Cir. 1983) (Scalia, J., dissenting), rev'd *sub nom. Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984)); *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2754 (1989).

Indiana's public indecency statute is clearly content-neutral under these definitions. By its very terms, the statute has nothing to do with expression. It prohibits public nudity (as well as public sexual intercourse and certain other specified sexual conduct in public). Assuming that public nudity can convey messages, the Indiana statute does not judge public nudity by the content of its message. Unlike the flag desecration statute held unconstitutional in *Johnson*, Indiana's public indecency statute does not prohibit conduct if it carries one message while allowing the same conduct if it carries another message. See *Johnson*, 109 S. Ct. at 2543. Unlike the flag desecration statute held unconstitutional in *United States v. Eichman*, 110 S. Ct. 2404, 2408 (1990), the Indiana statute does not serve any governmental interest related to the suppression of expression. Respondents' nude dancing would not become permissible under the Indiana law if its alleged message of sensuality and eroticism were changed or eliminated altogether. All public nudity is equally proscribed by the Indiana statute regardless of what message may be intended; the law applies equally to dancers in bars and adult bookstores, streakers at sporting events, flashers on street corners, or nudists in state parks.[3]

[3] In *Baysinger*, the Supreme Court of Indiana recognized that the State "may be constitutionally required to tolerate or to allow some nudity as a part of some larger form of expression meriting protection, when the communication of ideas is involved." 397 N.E.2d at 587. The court's statement does not alter the fact that Indiana's public indecency statute is content-neutral. If some public nudity must be permitted because it is "part of some larger form of expression" communicating ideas, the State would tolerate it without regard to the particular idea communicated in the larger work.

The Indiana statute does not "proscribe particular conduct *because* it has expressive elements" and does not turn on the State's agreement or disagreement with the message allegedly presented. *Johnson*, 109 S. Ct. at 2540 (emphasis in original); *Clark*, 468 U.S. at 295. Regulation of nudity is "justified without reference to the content of the regulated speech" and any communicative element that public nudity might have is not the "*basis* for singling out that conduct for proscription." The statute is therefore content-neutral within the meaning of this Court's decisions.[4]

C. Indiana's Public Indecency Statute Furthers A Substantial Governmental Interest.

The governmental interest served by Indiana's public indecency statute is "self-evident." Pet. App. 53 (Coffey, J., dissenting). The statute is intended to prevent indecent conduct in public, thereby preserving public morality and providing a more desirable social, cultural, and ethical environment for Indiana's citizens.

This interest is clearly legitimate and important. The Court has acknowledged the right of the States to main-

[4] Notwithstanding the relevant precedents from this Court, the court of appeals asserted in a footnote that the Indiana statute is "*directly* related to the suppression of free expression." Pet. App. 15 n.7 (emphasis in original). The court's explanation was that, by restricting activity of which the Indiana legislature disapproves, the statute prohibits conduct "precisely because it expresses a particular message contrary to the legislature's prescribed vision." *Ibid.* This cannot be correct. If it were, no statute would be content-neutral. Any regulation of conduct makes some conduct unlawful. The whole point of regulation is to prevent or discourage conduct that is "contrary to the legislature's vision." By prohibiting certain conduct, the legislature does not stifle opposition to its prohibition. If a legislature were required to permit such opposition to be expressed by the very conduct that is prohibited, no statutory prohibition could avoid running afoul of the First Amendment.

tain a decent society, and it has recognized that a State may legitimately act to protect "the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), quoted with emphasis in *Roth v. United States*, 354 U.S. 476, 485 (1957), and *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61 (1973). In fact, the Court has emphasized that the interest of state and local governments "in attempting to preserve the quality of * * * life [within their jurisdictions] is one that must be accorded high respect." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976). Similarly, in *Bowers v. Hardwick*, 478 U.S. 186, 192, 196 (1986), the Court said that state laws properly may be "based on notions of morality," particularly when the laws' "[p]roscriptions * * * have ancient roots," as they do in the case of public nudity or public indecency laws.

The governmental interest served by Indiana's public indecency statute is clearly as "substantial" or "significant" as interests the Court has found adequate in the past to justify regulation that had some incidental impact on expression.[5] This portion of the Court's test for the propriety of such regulation is satisfied here.

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[5] See, *e.g.*, *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-303 (1974) (plurality opinion) (city's interest in making its buses "rapid, convenient, pleasant, and inexpensive" justified prohibition on political advertising on the sides of city buses); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-508, 510 (1981) (plurality opinion); *id.* at 552 (Stevens, J., dissenting in part); *id.* at 559-561 (Burger, C.J., dissenting); *id.* at 570 (Rehnquist, J., dissenting) (city's interest in avoiding visual clutter was sufficient to justify prohibition on billboards); *Clark*, 468 U.S. at 296 ("substantial interest in maintaining the parks in the heart of our Capital in an attractive and intact condition" allowed government to prohibit symbolic sleeping); *Ward*, 109 S. Ct. at 2756 (substantial interest in protecting citizens from unwelcome noise adequately supported requirement that performers use sound equipment and technicians provided by the city).

D. Indiana's Public Indecency Statute Imposes Only Reasonable Restrictions That Are Narrowly Tailored And Leave Open Ample Alternative Channels Of Communication.

To be constitutional, regulation that has an incidental effect on expression must be narrowly tailored to the governmental purpose and must "leave open ample alternative channels for communication." *Clark*, 468 U.S. at 293. As the Court explained last year in *Ward*, a restriction does not become constitutionally impermissible merely because it is not " 'the least intrusive means' of achieving the desired end" or because there is " 'some imaginable alternative that might be less burdensome on speech.' " *Ward*, 109 S. Ct. at 2757 (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 657 (1984) (opinion of White, J.), and *United States v. Albertini*, 472 U.S. 675, 689 (1985)). A regulation is sufficiently narrow "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest * * *." *Id.* at 2758. Even a "complete ban" is "narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). See also *Clark*, 468 U.S. at 293-295.

This Court has never held that nudity could not be regulated or prohibited. On the contrary, the Court has indicated on several occasions that prohibitions of public nudity, such as the prohibitions found in public indecency statutes, are permissible. See, *e.g.*, *Paris Adult Theatre I*, 413 U.S. at 67 ("Conduct or depictions of conduct that the state police power can prohibit on a public street do not become automatically protected by the Constitution merely because the conduct is moved to a bar or a 'live' theater stage"); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 n.7 (1975) ("Scenes of nudity in a movie, like pictures of nude persons in a book, must be considered as a part of the whole work. * * * [S]uch nudity is distinguishable from the kind of public nudity

traditionally subject to indecent-exposure laws"); *Roth v. United States*, 354 U.S. at 512 (Douglas, J., dissenting) ("No one would suggest that the First Amendment permits nudity in public places").

In this case, Indiana's public indecency statute defines "nudity" narrowly. The Supreme Court of Indiana has also narrowly construed the phrase "public places" to include only places where people may go " 'with or without invitation and without restraint' " or places that are " 'available to all or a certain segment of the public.' " *Baysinger*, 397 N.E.2d at 583 (quoting *Peachey v. Boswell*, 240 Ind. 604, 167 N.E.2d 48, 56-57 (1960)).

The Court's test for state regulation that may affect expression "does not 'assign to the judiciary the authority to replace the [government agency] * * * or endow the judiciary with the competence to judge how much protection * * * is wise and how that level of [protection] is to be attained.' " *Albertini*, 472 U.S. at 689 (quoting *Clark*, 468 U.S. at 299). The State of Indiana has determined the amount of protection its citizens require from public indecency. That reasonable judgment should be respected, particularly since it is difficult to imagine how the nudity portion of Indiana's public indecency statute could be more narrowly tailored and still maintain some reasonable connection to the concepts of "nudity" and "indecency" as the words are commonly understood.

In addition to being narrowly tailored, Indiana's statute satisfies the requirement that "ample alternative channels of communication" be left open for respondents to communicate their alleged message. The statute involves only public conduct and does not limit "private" conduct. It does not restrict the spoken or written word, photographs, films, or any other traditional channels of communication. Perhaps most important, the statute does not ban dancing that communicates the emotional "theme" of "eroticism and sensuality" found by the court of appeals. Respondents may dance and perform stripteases

without interference from the State of Indiana so long as they wear at least the minimal amount of clothing required by law. If respondents have some message that they wish to communicate, Indiana's public indecency statute does not censor or silence that message. See *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984) ("the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places").

In sum, even if some protected symbolic expression is involved in nude dancing in bars and adult bookstores, Indiana's public indecency statute imposes content-neutral, narrowly tailored restrictions in order to achieve a recognized substantial governmental interest. The court of appeals erred in holding the statute unconstitutional as applied to respondents.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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